

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

INNOVATIVE SOFTWARE
DESIGNS, INC.

BKY 99-41363

Debtor.

ORDER

At Minneapolis, Minnesota, May 15, 2000.

The above-entitled matter came on before the undersigned Judge upon the filing of a proof of interest by Keith Kimmons ("Kimmons") and the Debtor's objection thereto. Thomas Brever represented Kimmons. Matthew Burton represented the Debtor, Innovative Software Designs ("Debtor" or "ISD"). The parties agreed to submit the issue on the following record: (1) the transcript of the evidentiary hearing held on December 13 and 14, 1999; (2) the exhibits introduced at the December 13 and 14 hearing; and (3) the objection to the proof of interest filed by the Debtor, which appends the order requiring the filing of proofs of interest and the proof of interest filed by Kimmons. The proof of interest itself is part of the record, but the documents appended thereto are not part of the record. Based upon the record as agreed upon by the parties, the court makes the following:

FINDINGS OF FACT

1. The Debtor, Innovative Software Designs ("Debtor") filed a voluntary petition under Chapter 11 of the Bankruptcy

Code on March 16, 1999. The Debtor did not include Kimmons in its schedules as having either a claim or interest in the case. Kimmons, having received no notice of the bankruptcy filing, later learned of the bankruptcy case through a former business partner. He then filed a proof of claim on August 30, 1999, in which he asserted a claim of \$150,000 for unpaid salary and a 50 percent equity interest in the Debtor. The Debtor filed an objection to Kimmons' proof of claim.

2. On December 13 and 14, 1999, the parties appeared before this court for an evidentiary hearing regarding the Kimmons proof of claim and the Debtor's objection thereto. By prior order, this court disallowed Kimmons' claim of \$150,000 in salary. This court further determined that, insofar as the proof of claim constituted a proof of interest, it was not properly before the court pursuant to the Local Rules, which allow for the filing of a proof of interest only upon order of the court. Thus, the proof of interest was stricken as improperly filed because the court had not ordered the filing of proofs of interest.

3. The Debtor moved for an order allowing for the filing of proofs of interest, which motion was granted by the court on January 12, 2000. Kimmons filed a proof of interest on January 21, 2000, and continued to assert a 50 percent equity

interest in the Debtor. The Debtor renewed its objection to the contention that Kimmons owned any part of the Debtor, thus bringing the matter back before this court.

4. The Debtor was incorporated on June 5, 1990, by Henry Camacho ("Camacho"). He initially incorporated it as a sideline business to allow him to design software outside of his regular employment.

5. Camacho met Kimmons in approximately 1992 when both worked for a company known at the time as Businessland. Camacho reported to Kimmons regarding their consulting work on the Pillsbury Company's computer network.

6. In 1994, after Camacho had left Businessland, Kimmons contracted him about a new business opportunity. Camacho joined with Kimmons and another partner, James Bombardo, to form a business known as Network Management Services and Systems ("NMS"). Each of the three partners, at least as Camacho understood the agreement, were to be equal owners of the business. They incorporated NMS on April 25, 1994. Within NMS, the partners ran a number of computer-related businesses. Specifically, NMS focused on consulting work. A business originated by Bombardo, known as Excess, Inc.,¹ was

¹Although known by the parties as Excess, Inc., this portion of the business was not actually incorporated at this time.

responsible for equipment repair and hardware sales.

Camacho's corporation, ISD, performed programming and software services. At that time, all of the businesses operated under the umbrella of NMS. They did not deal with Excess or ISD as separate entities. However, the partners had no formal documentation or agreement regarding the actual structure of the business.

7. At one point, Bombardo indicated to the others his belief that he owned all of NMS. In response to this claim, the parties drafted a document dated September 16, 1994, which states, "This document states that Network Management Services and Systems Inc., Excess Inc., and Innovative Software Designs, Inc. are equally owned by the following persons." The document then lists James Bombardo, Henry F. Camacho Jr., and Keith E. Kimmons as the owners and contains the signature of each of them.

8. Late in 1994, Bombardo decided that he wanted to split from the business. In an agreement dated December 20, 1994, the partners agreed that Bombardo would sell his interest in NMS and ISD to Kimmons and Camacho, and Kimmons and Camacho would sell their interest in Excess to Bombardo. Thus, Bombardo left the partnership, and, in January of 1995, formally incorporated Excess, Inc.

9. Early in 1995, Kimmons also left the business for what he termed his "dream job" at Blue Cross and Blue Shield of Minnesota ("Blue Cross"). Initially, Kimmons was an independent contractor, but later was hired full time. Through this position, Kimmons obtained consulting opportunities for Camacho. Based upon Kimmons' recommendation, Camacho billed the services through ISD rather than as an individual.

10. Soon thereafter, Camacho also began developing ISD as an internet service provider. As the business began growing, he asked Kimmons if he would like to invest in the company. Kimmons declined, stating that he no longer wanted any involvement with ISD. Camacho still stayed in contact with Kimmons during this time period, but only as a result of his work for Blue Cross. Camacho testified that had he known Kimmons still claimed an interest in ISD, he would have developed the internet service business through a new corporate entity.

11. Camacho sought other forms of financing, including a Small Business Administration loan. Importantly, in the application for that loan, Camacho listed himself as the sole shareholder and provided the only personal guarantee. In

addition, the tax returns for ISD from 1994 through 1998 all indicate that Camacho is the sole shareholder.

12. In 1997 Blue Cross initiated a criminal investigation against Kimmons related to invoices he submitted on behalf of ISD and another corporation owned by Kimmons' son, Investment Technology Group ("ITG"). Blue Cross alleged that the invoices were fraudulent and fired Kimmons as a result of the investigation. However, the criminal investigation is ongoing, and Kimmons asserted his 5th Amendment rights with respect to all matters related to ITG. Kimmons maintains that all invoices submitted on behalf of ISD were for legitimate work performed for Blue Cross.

13. Kimmons initially tried to work with Camacho to defend against the criminal charges. However, after Camacho discovered the details of the criminal investigation, he refused to have any further contact with Kimmons. He told Kimmons, through their attorneys, that he would have Kimmons arrested if he came to the ISD offices.

14. In December of 1997, Kimmons commenced an action against Camacho and ISD, asserting an ownership interest in ISD and seeking dissolution of the company. After a brief period of discovery, Kimmons soon was unable to afford his attorney, and the lawsuit was not pursued any further.

According to Camacho, the complaint was the first indication to him that Kimmons was still asserting an ownership interest in ISD.

15. During this time frame, Kimmons was also experiencing other problems in his life. On December 12, 1994, the Ramsey County District court entered a Judgment and Decree finalizing the divorce between Kimmons and his wife. In connection with those proceedings, Kimmons signed a sworn statement of income, assets, and liabilities. Nowhere in that statement did Kimmons list an interest in ISD even though he signed it only two months after the agreement between the three partners that they would be equal owners of the three businesses.²

16. Also in 1994, the IRS was pursuing collection efforts against Kimmons. In the installment agreement that Kimmons entered into with the IRS, he stated that he had no stocks, bonds, or investments. Thus, there was again no mention of his interest in either NMS or ISD.

17. Kimmons' 1994 tax return indicates that NMS was his sole proprietorship and does not indicate that Kimmons has any

² It is also curious that Kimmons continued to maintain a residence with his wife and never told Camacho about the divorce until 1997.

ownership interest in ISD. Kimmons' 1998 income tax return also does not give any indication of ownership in ISD.

18. In the course of all of this activity, NMS was involuntarily dissolved by the Secretary of State on September 25, 1998, due to failure to file its annual registration papers. It is clear that the company had not been doing any business since at least 1995.

CONCLUSIONS OF LAW

A proof of interest filed in a bankruptcy proceeding is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a) (1994). Thus, a properly filed proof of interest constitutes prima facie evidence of the validity of the claimed interest. 4 Lawrence P. King, et al., Collier on Bankruptcy ¶ 502.02[1], at 502-10 (15th ed. rev. 2000). As with a proof of claim, if an objection is filed, the objector must come forward with evidence rebutting the proof of interest or it will be allowed. See Gran v. IRS (In re Gran), 964 F.2d 822, 827 (8th Cir. 1992); In re Oriental Rug Warehouse Club, Inc., 205 B.R. 407, 410 (Bankr. D. Minn. 1997). However, if the objecting party produces such evidence, the burden of proof shifts to the claimed interest holder to produce evidence of the validity of the proof of

interest. See Gran, 964 F.2d at 827; Oriental Rug, 205 B.R. at 410.

The Debtor has raised numerous grounds to rebut Kimmons' proof of interest, which are sufficient to shift the burden of proof back to Kimmons. The Debtor argues first that the September 1994 agreement dividing ownership of the three companies between the parties was not binding either due to lack of consideration or due to failure of the consideration. It further argues that the parties had no agreement to share ownership of the company after December 1994 when Bombardo left the enterprise. Alternatively, the Debtor argues that, even if the parties once had an enforceable agreement, Kimmons cannot assert it due to judicial estoppel, collateral estoppel, laches, equitable estoppel, and general principles of equity. However, I need not address any of these arguments. Even if the parties at any point had a binding agreement and even if none of the equitable doctrines raised by the Debtor apply, whatever agreement they reached was clearly abandoned soon thereafter.

Abandonment of a contract is a matter of intent to be ascertained from the surrounding facts and circumstances and may be implied from the acts of the parties. Buresh v. Mullen, 207 N.W.2d 279, 281 (Minn. 1973). A repudiation by

one party to a contract if acquiesced in by the other party is tantamount to abandonment. Desnick v. Mast, 249 N.W.2d 878, 884 (Minn. 1976). Mutual abandonment must be clearly expressed, and the acts and conduct of the parties must be positive, unequivocal, and inconsistent with the existence of the contract. Id.

I find that the parties unequivocally abandoned their agreement that each would own equal shares of NMS, ISD, and Excess. Clearly, the parties agreed in writing to abandon the agreement insofar as it involved Excess. They executed an explicit agreement through which Camacho and Kimmons sold their interest in Excess to Bombardo, and Bombardo sold his interest in NMS and ISD to Camacho and Kimmons.

Camacho and Kimmons, through their subsequent actions, then abandoned the remaining aspects of the agreement. Numerous pieces of evidence support this conclusion. For instance, Kimmons left the enterprise for a job with Blue Cross, and the parties allowed NMS to dissolve. Such an action is entirely inconsistent with the agreement especially because NMS was the key component of the operations.

Also convincing is Camacho's testimony that Kimmons refused the request to invest in ISD and stated that he no longer wanted any involvement in ISD. Camacho acquiesced in

this decision by obtaining other financing and acting as the sole guarantor. Camacho's belief that Kimmons was no longer an owner of ISD is further evidenced by the fact that Camacho is listed as the sole shareholder in all of the corporate income tax returns.

Several pieces of evidence also suggest that Kimmons himself no longer believed that he had an interest in ISD. For instance, Kimmons did not list an interest in ISD in connection with his divorce proceedings despite his warranty under oath that he had made an accurate, complete, and current disclosure of all income, assets, and liabilities. This omission is particularly telling in light of the fact that the agreement purportedly granting Kimmons an interest in ISD was executed only two months earlier. Kimmons also failed to include any mention of his interest in ISD in connection with his installment agreement with the IRS or in either of the two tax returns available for him, the 1994 and 1998 returns.

Finally, the evidence suggests that Kimmons also believed that Camacho no longer had an interest in NMS. Kimmons listed NMS as a sole proprietorship in his 1994 tax returns. Such action is also entirely inconsistent with the terms of the agreement.

There is very little evidence contrary to a finding of abandonment. First is Kimmons' state court complaint asserting his ownership interest. While Kimmons did serve this complaint on Camacho in 1997, this action did not occur until well after the evidence shows they had abandoned the agreement. It was simply too late for him to claim he still had an interest in the Debtor. Furthermore, it appears that the complaint was never filed with any court, and Kimmons has not taken any action in pursuit of a recovery since 1997. Thus, the complaint itself has been abandoned.

The only other evidence contrary to abandonment is Kimmons' direct testimony. In short, I find Camacho's version of events to be much more credible. Kimmons was impeached badly on a number of occasions. Accordingly, I simply do not give any credit to his testimony that he always believed he held an ownership interest in the Debtor and that he remained involved in its operations, albeit behind the scenes.

I, therefore, conclude that Kimmons walked away from the agreement, and Camacho acquiesced. The abandonment was either explicit when Kimmons refused to continue to contribute to the business and declared that he no longer wanted any involvement in it, or it was implicit through Kimmons' failure to take any part in the business after December of 1994. Kimmons has only

returned now when it appears that he may receive some payment through the bankruptcy.

ACCORDINGLY, IT IS HEREBY ORDERED THAT the Proof of Interest filed by Keith Kimmons is disallowed in its entirety.

Judge

Nancy C. Dreher
United States Bankruptcy